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10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA**

12 JONATHAN WAYNE BOTTEN, SR.;
13 TANJA DUDEK-BOTTEN;
14 ANNABELLE BOTTEN; and J.B., a
minor by and through his guardian
15 JONATHAN WAYNE BOTTEN, SR.,

16 Plaintiffs,
17 vs.

18 STATE OF CALIFORNIA; COUNTY
19 OF SAN BERNARDINO; ISAIAH
KEE; MICHAEL BLACWOOD;
BERNARDO RUBALCAVA;
ROBERT VACCARI; JAKE ADAMS;
and DOES 1-10 inclusive,

20 Defendants.

21 CASE NO. 5:23-cv-00257-KK-(SHKx)

22 *Assigned for All Purposes to:
Hon. Kenly Kiya Kato—Courtroom #3*

23 **COUNTY DEFENDANTS' NOTICE
24 OF MOTION AND MOTION FOR
SUMMARY JUDGMENT, OR IN
THE ALTERNATIVE SUMMARY
ADJUDICATION; MEMORANDUM
OF POINTS AND AUTHORITIES**

25 *[Filed Concurrently County Defendants'
26 Separate Statement of Undisputed
27 Material Facts; Exhibits; Proposed
28 Judgment]*

Date: March 20, 2025
Time: 9:30 a.m.
Courtroom: 3

Trial: July 28, 2025

Complaint filed: 02/16/23
FAC filed: 06/08/23

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on March 20, 2025, at 9:30 a.m., or as soon thereafter as counsel may be heard, in Courtroom 3 of the above-entitled Court located at 3470 Twelfth Street, Riverside, California, Defendants County of San Bernardino, Jake Adams, and Robert Vaccari (“County Defendants”) will, and hereby do, move the Court pursuant to Fed. R. Civ. P. Rule 56, for an order granting summary judgment, or in the alternative summary adjudication as to each claim in Defendants’ favor, and against Plaintiffs Jonathan Wayne Botten Sr., Tanja Dudek-Botten, Annabelle Botten, and J.B., a minor by and through his guardian Jonathan Wayne Botten, Sr. (“Plaintiffs”) on Plaintiffs’ First Amended Complaint (“FAC”).

The grounds for issuing an order granting summary judgment/adjudication as to each claim in favor of County Defendants are as follows¹:

1. Plaintiffs’ Fourth Claim for Negligence against the County of San Bernardino, Robert Vaccari, and Jake Adams is without merit and fails as a matter of law. Further, Robert Vaccari, Jake Adams, and County of San Bernardino are immune from liability pursuant to Cal. Gov. Code §§ 815.2(b), 820.2, and/or 820.8 because of the superseding conduct of a third party. Finally, Plaintiffs’ novel theory that the County Defendants are liable not because they shot the Bottens, but because they allegedly used negligent tactics when apprehending Mr. Puga, was not fairly set forth in their Government Tort Claim and is therefore barred here. *See*, Cal. Gov. Code §§ 910, *et seq.*

2. Plaintiffs’ Fifth Claim for Negligent Infliction of Emotional Distress against the County of San Bernardino, Robert Vaccari, and Jake Adams is without merit and

¹ Pursuant to the meet and confer efforts preceding this Motion, Plaintiffs have stipulated to dismiss all claims against the County Defendants, except Negligence and Negligent Infliction of Emotional Distress. (Dkt. 82). As a result, all other claims were dismissed by Court order. (Dkt. 83).

1 fails as a matter of law. Further, Robert Vaccari, Jake Adams, and County of San
2 Bernardino are immune from liability pursuant to Cal. Gov. Code §§ 815.2(b), 820.2,
3 and/or 820.8 because of the superseding conduct of a third party. Finally, Plaintiffs'
4 novel theory that the County Defendants are liable not because they shot the Bottens,
5 but because they allegedly used negligent tactics when apprehending Mr. Puga, was
6 not fairly set forth in their Government Tort Claim and is therefore barred here. *See*,
7 Cal. Gov. Code §§ 910, *et seq.*

8 This Motion is made on the grounds that there are no triable issues of material
9 facts as to any of the foregoing matters, and the County Defendants are entitled to
10 judgment as a matter of law. *See*, Fed. R. Civ. P. 56.

11 County Defendants' Motion is based upon this Notice, the accompanying
12 Memorandum of Points and Authorities, the Declarations of Jake Adams, Lucien
13 Haag, Ken Hubbs, and Anita K. Clarke, and the Exhibits submitted therewith; the
14 concurrently-filed Separate Statement of Uncontroverted Material Facts and
15 Conclusions of Law; complete files and records of this action; and upon such other
16 and further matters as may properly come before the Court.

17 Pursuant to Local Rule 7-3, this Motion is being filed following meet and
18 confer efforts that commenced on January 16 with Defendants serving a detailed meet
19 and confer letter. This letter was then followed up by the required real-time telephonic
20 meet and confer between counsel on January 22, 2025 where the claims were
21 discussed at length. Following this conference, the parties continued to exchange
22 additional legal authority via email based on said discussions. While the parties were
23 eventually able to reach agreement on the dismissal of several claims as reflected in
24 the stipulation filed at Docket Number 82, Plaintiffs refused to dismiss their
25 Negligence and Negligent Infliction of Emotional Distress claims despite concessions
26 that no bullets fired by the County Defendants actually struck any of the Botten
27 Plaintiffs. County Defendants therefore request this Court hear and decide the issues

1 raised herein and grant summary judgment on all claims.
2

3 DATED: January 30, 2025

4 **LYNBERG & WATKINS**
5
6 A Professional Corporation

7 By: /s/ Shannon L. Gustafson

8 Shannon L. Gustafson
9 Amy R. Margolies
10 Anita K. Clarke
11 Attorneys for Defendants, COUNTY OF
12 SAN BERNARDINO, ROBERT
13 VACCARI and JAKE ADAMS

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MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

Plaintiffs have filed this lawsuit against the County of San Bernardino, and its employees Deputy Jake Adams and Sergeant Vaccari (hereinafter “County Defendants”) without any legal basis as the undisputed evidence clearly establishes it was a physical impossibility for the County Defendants to have been the source of any of the injuries alleged by the Botten Plaintiffs.

8 In apparent recognition of the same, Plaintiffs have dismissed their § 1983
9 claims, and intentional state law torts. (*See* Dkt. 82). However, Plaintiffs stubbornly
10 maintain the County Defendants should nevertheless be held liable for Negligence
11 and Negligent Infliction of Emotional Distress for injuries caused by shots fired by a
12 separate law enforcement agency. In short, it is Plaintiffs' theory that the County
13 Defendants allegedly employed negligent tactics when apprehending a suspect and
14 therefore by proxy created a broad and far reaching duty to every single occupant of
15 the neighborhood to protect them from any potential harm from every law
16 enforcement officer on scene. Simply put, there is no statutory authority or case law
17 to support this expansive duty. *See*, Government Code § 820.8 ("a public employee
18 is not liable for an injury caused by the act or omission of another person.").

II. STATEMENT OF FACTS

A. Tort Claims by the Botten Family

21 On April 6, 2021, each member of the Botten family submitted an identical
22 Tort Claim to the County of San Bernardino. (UMF 119-122). Each claim recited
23 the same factual circumstances as follows: "On or about February 17, 2021, various
24 police agencies including the California Highway Patrol were in pursuit of, and
25 apprehending an alleged suspect at or about the roadway near the home of claimants.
26 There were shots fired by the police agency employees. Respondent family members
27 were at their home located at 17944 Catalpa Street, Hesperia, Ca 92395. The bullets

1 shot and fired in the course of the pursuit and apprehension struck claimant resulting
2 in serious injury and damage.” (UMF 123-126). No mention was made of any
3 negligent tactics by the County Defendants preceding the shooting. (UMF 123-126).

4 **B. Incident Involving Hector Puga**

5 On February 16, 2021, CHP received reports that a white Ford SUV with a
6 funeral sticker on the back window had been involved in shooting at another vehicle
7 on the freeway earlier in the evening. (UMF 9-10). CHP Officers Blackwood and
8 Rubalcava located the vehicle in the early morning hours on February 17, 2021 and
9 attempted a traffic stop. (UMF 11). The driver of the vehicle, later identified as
10 decedent Hector Puga, then led the CHP officers on a pursuit, which was later joined
11 by CHP defendant Sergeant Kee. (UMF 12-14). At some point Deputy Adams and
12 Sergeant Vaccari also assisted CHP in this pursuit of Puga. (UMF 15). The pursuit
13 terminated at the intersection of Peach Avenue and Catalpa Street in Hesperia,
14 California when the suspect vehicle became disabled, just south of Catalpa. (UMF
15 16-18). While the passenger of the vehicle complied with commands and was safely
16 taken into custody, Puga refused to exit the vehicle for over an hour, despite repeated
17 commands for him to do so and the deployment of pepper balls into the vehicle to
18 coerce his exit. (UMF 19-24).

19 Eventually, Puga exited his vehicle on the driver’s side, but before he could be
20 safely taken into custody, he ran to the front of his vehicle. (UMF 25-26). From this
21 position the law enforcement officers could no longer see Puga’s waistband, which
22 was now concealed by his vehicle. (UMF 27-28). Defendants Kee and Rubalcava
23 approached Puga from the driver’s side of his vehicle, while Defendants Vaccari and
24 Adams approached from the passenger side to apprehend Puga. (UMF 29-30).

25 Defendant Kee, armed with a rifle and Defendant Rubalcava armed with his
26 duty weapon, approached with their weapons drawn. (UMF 31-32). Defendant
27 Vaccari was armed with a less lethal 40 mm launcher that deploys less lethal sponge

1 rounds. (UMF 33-34). Defendant Adams approached with his duty weapon drawn.
2 (UMF 35). Meanwhile, Defendant Blackwood remained positioned behind the door
3 of his own patrol vehicle with a rifle drawn. (UMF 36-38).

4 As the four law enforcement officers approached, Puga's right hand went from
5 above his head towards his waistband. (UMF 39). As he did so, Defendants testified
6 they saw Puga draw a firearm from his waistband. (UMF 40-43). Sgt. Kee testified
7 he believes he fired first and continued to fire as Puga ran. (UMF 44-45). Officers
8 Rubalcava, Blackwood and Deputy Adams also fired at Puga. (UMF 46-48). As the
9 officers fired, Puga ran in a northwestern direction away from them. (UMF 49). Puga
10 eventually fell and later died from his injuries. (UMF 50-51). A handgun was located
11 underneath his body. (UMF 52).

12 Sergeant Vaccari could not recall whether a round was ejected from his less
13 lethal launcher. (UMF 53). However, it is undisputed he did not fire any lethal rounds
14 from his service weapon during the incident. (UMF 54).

15 **C. Location of Plaintiffs**

16 The Plaintiffs' house is located on the northeast corner of the intersection of
17 Peach and Catalpa, pushed back slightly from the street. (UMF 55-56). A deputy
18 shooting at the Botten house from where Puga stopped his vehicle would have to shoot
19 in a northeastern direction. (UMF 57).

20 From the time that Puga's vehicle became disabled until the time of the
21 shooting, Sergeant Vaccari and Deputy Adams did not make contact with the Botten
22 family or give the Botten family any commands. (UMF 58-59). The Botten family
23 observed various portions of what occurred between law enforcement and Puga from
24 inside their residence at different times. (UMF 60-68). The Bottens did not know
25 who Puga was. (UMF 69).

26 At the time of the shooting, Plaintiff Botten Sr. was inside of his house
27 approximately six inches from the closed security door. (UMF 70-71). Plaintiff Tanja

1 Dudek-Botten was roughly in the same area as Botten Sr., near the front entrance but
2 behind her husband. (UMF 72). Plaintiff Botten Jr. was several feet from the front
3 door inside the house when the shooting occurred, somewhere behind his mother.
4 (UMF 73-74). Annabelle Botten was in between the front door and the kitchen at the
5 time of the shooting. (UMF 75).

6 **D. CHP Defendants**

7 Sergeant Kee and Officer Blackwood were armed with AR-15 rifles with .223
8 Remington caliber bullets (UMF 77-78) and Officer Rubalcava was armed with a
9 Smith & Wesson M&P pistol with .40 Smith & Wesson caliber bullets. (UMF 79).

10 Specifically, CHP Officer Rubalcava approached Puga from the driver's side
11 of Puga's vehicle (UMF 80) and fired approximately 10-15 shots (UMF 81) in a
12 northeastern direction while Puga was in front of his own vehicle (UMF 82) and
13 subsequently while Puga was running away. (UMF 83).

14 CHP Sergeant Kee was also on the driver's side of Puga's vehicle (UMF 84),
15 with Rubalcava on his right (UMF 85) and discharged 18 rounds at Puga from his
16 AR-15 as Puga ran. (UMF 86).

17 CHP Officer Blackwood fired 20 shots with his AR-15 while Puga was in front
18 of him and as Puga ran away. (UMF 87-89).

19 **E. County Defendants – Vaccari and Adams**

20 Deputy Adams and Sergeant Vaccari approached Puga from the eastern side of
21 Puga's vehicle on the passenger side. (UMF 90). Deputy Adams was armed with a
22 Glock (9mm caliber) (UMF 91) and Vaccari had a less-lethal 40mm round launcher.
23 (UMF 33, 92). Deputy Adams' gun was pointed towards Puga during this approach,
24 and away from the Botten house and front door. (UMF 93-94). Deputy Adams
25 testified that upon seeing Puga draw a gun and hearing shots he returned fire at Puga
26 and continued firing as Puga ran in a northwestern direction. (UMF 40, 95-96).
27 Adams moved closer to the front passenger side of the vehicle to gain cover while

1 continuing to fire at Puga, who ran toward the northwest dirt corner of the intersection.
2 (UMF 97-99). Adams fired a total of 10 shots from his 9mm (UMF 100), all
3 discharged from the passenger side area of Puga's vehicle, in a northwesterly direction
4 as Puga ran in the same northwesterly direction. (UMF 101-102). The Botten
5 Plaintiffs, were inside the house near the front door area of the house when shots were
6 fired. (UMF 70-76). Deputy Adams firearm was never pointed in the direction of the
7 Botten family home, let alone the area of the front door. (UMF 93-94).

8 Sergeant Vaccari did not discharge his firearm. (UMF 103).

9 **F. Plaintiffs' Injuries**

10 Only shrapnel and bullet fragments were recovered from Botten Sr. (UMF
11 104). Tanja Dudek-Botten and Jonathan Botten Jr., were likewise injured, but again
12 only shrapnel and bullet fragments were recovered. (UMF 105-106).

13 A review of the injuries suffered by the Botten Plaintiffs are consistent with
14 rifle bullet fragments (UMF 104-107) and not the consequence of direct projectile
15 strikes, such as the 9mm bullets fired by Deputy Adams. (UMF 108). The 9mm pistol
16 bullets fired by Deputy Adams can be excluded as the source of the Botten family's
17 injuries (UMF 109) due to their low velocity as 9mm bullets (UMF 110) and their
18 propensity to remain intact following shallow incident angle strikes and subsequent
19 ricochet from ground and roadway (asphalt) impacts. (UMF 111). The injuries
20 sustained by the Botten family are therefore consistent with the ammunition fired by
21 the AR-15 rifle used by either Sergeant Kee and/or Officer Blackwood, and not the
22 9mm bullets utilized by Deputy Adams. (UMF 77-79, 91-92, 103, 112). The only
23 individual armed with a rifle shooting in the northeastern direction at any time during
24 the shooting was Sergeant Kee. (UMF 79, 82, 84, 86, 113).

25 Plaintiffs' home was in the northeast corner from where Puga's vehicle was
26 located and the shooting began. (UMF 49,76). Puga then ran in a northwestern
27 direction away from the Botten home. (UMF 114). Because Deputy Adams was

1 shooting in the opposite direction, his bullets were not ever fired towards the Botten
2 house. (UMF 93-94, 98-102). Even if his bullets were to have ricocheted, they would
3 remain intact and again could not have caused the type of injuries sustained by the
4 Bottens. (UMF 104-108, 115-116). No intact bullets were recovered from Plaintiffs
5 or their residence. (UMF 104-108, 117)

6 In short, the undisputed evidence is clear that the shots fired by Deputy Adams
7 did not and could not have caused any of the physical injuries sustained by the Botten
8 family. (UMF 91, 93-94, 96-99, 107-112). Further, neither Sgt. Vaccari nor Deputy
9 Adams had any contact with the Botten family prior to the shooting nor did they issue
10 any commands. (UMF 58-59).

11 Finally, law enforcement officers are trained to be aware of and clear their
12 background prior to using deadly force. (UMF 118). There is no evidence to support
13 that Sgt. Vaccari and/or Deputy Adams were aware that Sgt. Kee or any other CHP
14 officer would deviate from this law enforcement training in the discharge of their
15 firearms. (UMF 118).

16 **III. PLAINTIFFS HAVE INSUFFICIENT EVIDENCE**

17 Under *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the burden on the moving
18 party may be discharged by pointing out that there is an **absence of evidence** to
19 support the non-moving party's case. Once the moving party shows the absence of
20 evidence, the burden shifts to the non-moving party to designate specific facts
21 showing there is a genuine issue for trial. As summarized by the Ninth Circuit, "the
22 Celotex 'showing' can be made by pointing out through argument – the absence of
23 evidence to support plaintiff's claim." *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th
24 Cir. 2001) (en banc).

25 As set forth above the undisputed evidence clearly establishes that the weapons
26 discharged by Defendants Adams and Vaccari during the incident could not have
27 **caused** any of the physical injuries to the Botten family.

1 **IV. NEGLIGENCE AND NEGLIGENT INFILCTION OF EMOTIONAL**
2 **DISTRESS**

3 Based upon the meet and confer efforts, Plaintiffs have advised they are
4 advancing a theory that although the County Deputies did not directly cause the
5 injuries to Plaintiffs, they are still responsible for the injuries caused by CHP based
6 on a general duty to protect the community when they engaged Puga. (Clarke Decl.
7 ¶ 4, Exhibit N - correspondence).

8 Not only does a general duty to protect society form third party actions not exist
9 under established law, *Zelig v. County of Los Angeles*, 27 Cal.4th 1112, 1128 (2002),
10 but the injuries that occurred to the Plaintiffs as a result of the CHP actions, was not
11 foreseeable to County Defendants, who as evidence of their training, did not injure
12 any bystanders. Simply put, Plaintiffs' theory that where a law enforcement officer
13 is negligent in any manner when apprehending a suspect, that same officer is then
14 legally responsible for any and all injuries sustained by bystanders caused by the
15 negligence of others, is not only a far-reaching unwarranted extension of existing case
16 law, but the consequences of the same would financially cripple law enforcement
17 agencies moving forward.

18 **A. NEGLIGENCE**

19 “To establish negligence, it must be shown that (1) the defendant owed the
20 plaintiff a legal duty, (2) the defendant breached that duty, and (3) the breach was a
21 proximate or legal cause of the plaintiff's injuries.” *Gilmer v. Ellington*, 159 Cal. App.
22 4th 190, 195 (2008).

23 **1. County Defendants Had No Legal Duty**

24 “The existence of a duty of care is a question of law to be determined by the
25 court alone.” *Hernandez v. KWPH Enterprise*, 116 Cal. App. 4th 170, 176 (2004);
26 *Kentucky Fried Chicken of Cal, Inc. v. Superior Court*, 14 Cal. 4th 814, 819 (1997) (“the
27 existence of a duty is a question of law for the court.”).

1 Plaintiffs argue here that because there was a law enforcement encounter in
2 their neighborhood, County Defendants had some type of affirmative duty to evacuate
3 the Botten Plaintiffs or take some other action to avoid harm. However, law
4 enforcement officers may not be held liable merely for failing to take affirmative steps
5 to prevent injury to another. *Zelig*, 27 Cal.4th at 1128. “As a rule, one has no duty
6 to come to the aid of another. A person who has not created a peril is not liable in tort
7 merely for failing to take affirmative action to assist or protect another unless there is
8 some relationship between them which gives rise to a duty to act.” *Zelig*, 27 Cal.4th
9 at 1129 quoting *Williams v. State of California*, 34 Cal.3d 18, 23 (1983). Officers like
10 members of the public generally do not have a duty to aid another. *Zelig*, 27 Cal.4th
11 at 1129 citing *Lugtu v. California Highway Patrol*, 26 Cal.4th at 717.

12 As such, the duty to protect only exists where there is a “special relationship
13 between the parties or some other set of circumstances giving rise to an affirmative
14 duty to protect.” *Golick v. State of California*, 82 Cal. App. 5th 1127, 1144 (2022).
15 “First, the court must determine whether there exists a special relationship between
16 the parties or some other set of circumstances giving rise to an affirmative duty to
17 protect. Second, if so, the court must consult the factors described in *Rowland* to
18 determine whether relevant policy considerations counsel limiting that duty.” *Brown*
19 *v. USA Taekwondo*, 11 Cal. 5th 204, 209 (2021) citing *Rowland v. Christian*, 69
20 Cal.2d 108 (1968).

21 **a) No Special Relationship Exists**

22 Generally, there is no legal “duty,” and hence no liability for negligence, unless
23 there is a special relationship between the police and either the victim or the third
24 person which gives rise to a responsibility to control the third person's conduct. *See*
25 generally *Tarasoff v. Regents of University of California* 17 Cal.3d 425, 435 (1976).
26 In the case of law enforcement officers, a special relationship has been found only in
27 a “few narrow circumstances.” *M.B. v. City of San Diego* (1991) 233 Cal.App.3d

1 699, 704–705 (emphasis added); *Golick, supra*, 82 Cal. App. 5th at 1149 (2022)
2 (“Cases finding a special relationship based on performance of police duties are rare
3 and involve situations in which the victim detrimentally relied on some conduct or
4 representation by the officer.”) (emphasis added).

5 Absent a special relationship creating a special duty, the police have no legal
6 duty to control the conduct of others. *Von Batsch v. American Dist. Telegraph Co.*
7 175 Cal.App.3d 1111, 1122 (1985). Law enforcement officers have only been found
8 to establish a special relationship where they voluntarily assume a duty to provide a
9 particular level of protection and fail to do so or where the officer undertakes an
10 affirmative act that increases the risk of harm to the plaintiff, neither of which apply
11 here. *Zelig*, 27 Cal.4th at 1129. For example, a special relationship has been found
12 between an officer and an arrestee. *Frausto v. Department of California Highway*
13 *Patrol*, 53 Cal.App.5th 973, 993 (2020). Likewise, “a police officer who exercises
14 his or her authority to direct another person to proceed to—or to stop at—a particular
15 location, owes such a person a duty to use reasonable care in giving that direction, so
16 as not to put the person in danger or to expose the person to an unreasonable risk of
17 harm.” *Lugtu v. CHP*, 26 Cal.4th 703, 716 (2001) (emphasis added).

18 On the other hand, officers do not create a special relationship simply for
19 performing their duties. *Lopez v. City of San Diego*, 190 Cal.App.3d 678, 681 (1987)
20 (no special relationship between police responding to restaurant massacre scene and
21 victims of massacre where police delayed acting on plan to ““neutralize”” murderer);
22 *Von Batsch*, 175 Cal.App.3d at 1122, 1222 (no special relationship between county
23 and decedent's surviving wife when county's officers responded to a burglar alarm,
24 searched the premises, and erroneously advised decedent's co-employees that no
25 intruders were on the premises); *William v. State of California*, 34 Cal.3d 18, 24
26 (1983) (no special relationship between stranded or injured motorist and police based
27 on fact that police stopped to aid her).

1 Applied here, as a matter of law, there was no recognized special relationship
2 between the Botten family and the County Defendants such as the relationship
3 between a peace officer and an arrestee or an inmate. *See e.g. Kockelman v. Segal*,
4 61 Cal. App. 4th 491, 499 (1998) (“It has been observed that a typical setting for the
5 recognition of a special relationship is where “the plaintiff is particularly vulnerable
6 and dependent upon the defendant who, correspondingly has some control over the
7 Plaintiff’s welfare.”).

8 Likewise, none of the affirmative acts taken by Deputy Adams and/or Sergeant
9 Vaccari to apprehend Puga, increased the harm Plaintiffs were already exposed vis a
10 vis the pursuit terminating in their neighborhood. *Zelig*, 27 Cal. 4th at 1129
11 (“Liability may be imposed . . . if an officer undertakes affirmative acts that increase
12 the risk of harm to the plaintiff.”); *cf. Ikeda v. City & Cnty. of Honolulu*, No. 19-cv-
13 00009-DKW-KJM, 2019 WL 4684455, at *8 (D. Haw. Sept. 25, 2019) (“police
14 officers are under a duty to avoid any affirmative acts which worsen the situation of
15 the plaintiff”) (cleaned up); *Lopez*, 190 Cal. App. 3d at 681 (special relationship has
16 been found in cases where “the representations or conduct by the police which cause
17 the victim(s) to detrimentally rely on the police such that the risk of harm as the result
18 of police negligence is something more than that to which the victim was already
19 exposed.”).

20 It is undisputed that the Botten plaintiffs remained inside their residence
21 throughout the duration of the law enforcement encounter with Puga and that they
22 were never given any commands by County Defendants to do anything that would
23 have increased the risk of harm they were already exposed based on Puga’s refusal to
24 surrender peaceably. (UMF 58-59); *Golick*, 82 Cal. App. 5th at 1148 (“failing to
25 eliminate a pre-existing risk of harm does not satisfy the element of increased risk
26 required to establish a negligent undertaking.”).

27 While there is a recognized duty of law enforcement officers to act reasonably
28

1 in their own use of deadly force or face liability for injuries caused by their deadly
2 force, the undisputed evidence here is that Defendant Adams use of deadly force did
3 not injure the Bottens. (UMF 91, 93-94, 96-99, 107-112). County Defendants are not
4 aware of any case law that extends the duty to act reasonably when using deadly force
5 to a duty of care to bystanders harmed inadvertently by a different officer's use of
6 deadly force. *Koussayo v. City of Stockton*, 54 Cal. App. 5th 909, 946-947 (2020)
7 (City cannot be liable for the “collective response” as unreasonable, where no
8 individual officer is liable). Nor should the law be so extended.

9 Finally, Defendants anticipate Plaintiffs will argue the County Defendants
10 allegedly utilized negligent tactics during the standoff leading up to the shooting and
11 should therefore be held legally responsible for said tactics. However, there is no
12 evidence that any tactics by the County Defendants were outside of the realm of
13 reason given the actions of Puga. (UMF 22-43); *Brown v. Ransweiler*, 171 Cal. App.
14 4th 516, 537-538 (2009) (“As long as an officer’s conduct falls within the range of
15 conduct that is reasonable under the circumstances, there is no requirement that he or
16 she choose the ‘most reasonable’ action or the conduct that is the least likely to cause
17 harm and at the same time the most likely to result in successful apprehension of a
18 violent suspect, in order to avoid liability for negligence”).

19 Further, any claim that any such tactics prior to the shooting caused the CHP
20 officers to shoot toward the Botten house and injure them would be rank speculation.
21 *See Golick*, 82 App. 5th at 1148 (“In volatile situations, one can always argue that
22 the arrival of police officers caused incremental increase in tension at the scene, and
23 thus increased the risk of injury occurring, and whenever tragedy ensues one can
24 argue that a different police response would have produced a better outcome. But this
25 sort of speculative, after-action critique falls short” in subjecting an officer to tort
26 liability for negligence).

27 Again, while “negligence liability for an officer’s unreasonable use of deadly
28

1 force may potentially extend to the unintended victims who the officer injures” there
2 is no similar case authority to support the officer is liable for unintended injuries
3 caused by other officers’ use of deadly force. *See, Golick*, 82 Cal. App. 5th at 1127
4 (“But plaintiffs cite no authority for their theory that, because [Defendant] attempted
5 to apply deadly force against Wong, he thereby assumed a torty duty of care to the
6 hostages . . .”); *Id. at* 1137 (“officer’s lack of due care can give rise to negligence
7 liability for the intentional shooting death of a suspect.’ This settled rule does not
8 support plaintiff’s theory of negligence against the County Defendants, however
9 because [Defendant] did not shoot or kill Wong. The deputy shot at Wong, but none
10 of his shots hit their mark.”).

11 **b) The Rowland Factors Do Not Support a Duty**

12 Even if a special relationship were established between the County Defendants
13 and the Bottens, the *Rowland* policy considerations preclude liability here. As stated
14 by the California Supreme Court “. . . a court might conclude that duty should not be
15 imposed because, for example, the type of harm the plaintiff suffered was
16 unforeseeable, or because there was no moral blameworthiness associated with the
17 defendant’s conduct, notwithstanding the defendant’s special relationship to the
18 plaintiff. Put differently, even when a special relationship gives rise to an affirmative
19 duty to protect, a court must still consider whether the policy considerations set out in
20 *Rowland* warrant a departure from that duty in the relevant category of cases.” *USA*
21 at p. 222. (emphasis added).

22 The policy considerations in *Rowland* are:

23

- 24 • the foreseeability of harm to the plaintiff,
- 25 • the degree of certainty that the plaintiff suffered injury,
- 26 • the closeness of the connection between the defendant’s conduct and the
connection between the defendant’s conduct and the injury suffered,
- 27 • the moral blame attached to the defendant’s conduct,

1 • the policy of preventing future harm,
2 • the extent of the burden to the defendant,
3 • the consequences to the community of imposing a duty to exercise care
4 with resulting liability for breach, and the availability, cost, and
5 prevalence of insurance for the risk involved.

6 *Rowland*, 69 Cal.2d at 112-113.

7 The *Rowland* policy considerations instruct against imposing a duty on the
8 County Defendants here. First, it was not foreseeable that the Bottens who were
9 inside of their residence, would sustain injuries from another law enforcement officer
10 who failed to clear his background before shooting at the suspect (UMF 118) nor was
11 there any degree of certainty that the Bottens would sustain these types of injuries.
12 Likewise, the conduct of Puga in failing to comply with commands and the actions of
13 the CHP officers in shooting at Puga with the Botten house in their background were
14 much more closely related to the cause of the Botten injuries then any conduct by the
15 County Defendants. (UMF 82, 86, 100, 102-103, 113).

16 Moreover, it cannot be credibly argued that moral blame should be placed on
17 the County Defendants for attempting to apprehend a dangerous subject or because
18 an officer from another agency caused injury during that process. Imposing liability
19 as to the County Defendants for the direct harm caused by the CHP Defendants serves
20 no role in preventing future harm, but will certainly have a substantial impact on
21 public entities moving forward as they would now be responsible for any harm caused
22 to bystanders when trying to perform their duties to apprehend dangerous suspects,
23 regardless of whether they were the cause of such harm.

24 While an officer may be negligent for his own use of deadly force that results
25 in unintended injury, this duty has not and should not be extended to encompass
26 liability for the unintended consequences of another's use of deadly force. Policy
27 considerations dictate against such a result as imposing liability here would

1 essentially render the County of San Bernardino vicariously liable for injuries directly
2 caused by employees of the State of California.

3 Finally, there is no need to impose such a duty as Plaintiffs already have the
4 ability to seek damages as against the individual who was the direct cause of their
5 harm for said harm.

6 **2. The Botten Injuries Were Not Foreseeable**

7 Moreover, County Defendants only owe a legal duty to prevent injuries that
8 were reasonably foreseeable or damage that would likely occur. *See, Osborn v. City*
9 *of Whittier*, 103 Cal. App. 2d 609, 615-16 (1951). “Foreseeability supports a duty
10 only to the extent the foreseeability is reasonable.” *Sturgeon v. Curnutt* (1994) 29
11 Cal. App. 4th 301, 306. “Foreseeability involves three considerations: ‘the [general]
12 foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered
13 injury, [and] the closeness of the connection between the defendant's conduct and the
14 injury suffered.’” *Huang v. The Bicycle Casino, Inc.*, 4 Cal.App.5th 329, 341 (2d Cal.
15 2016). Further, “when the avoidance of foreseeable harm requires a defendant to
16 control the conduct of another person, or to warn of such conduct, the common law
17 has traditionally imposed liability only if the defendant bears some special
18 relationship to the dangerous person or to the potential victim.” *Tarasoff v. Regents*
19 *of Univ. of California*, 17 Cal. 3d at 435. Where the court “determines that the
20 defendant's conduct clearly falls outside the community's conception of fault, the
21 issue of foreseeability must be withdrawn from the jury.” *Cunningham v. Happy*
22 *Place, Inc.*, 157 Or. App. 334, 337 (1998).

23 “As a consequence, the analysis of foreseeability for purposes of assessing the
24 existence or scope of a duty is different, and more general, than it is for assessing
25 whether any such duty was breached or whether a breach caused a plaintiff's injuries
26 . . . ‘[I]n analyzing duty, the court's task ‘is not to decide whether a *particular*
27 plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's

1 conduct, but rather to evaluate more generally whether the *category* of negligent
2 conduct at issue is sufficiently likely to result in the *kind* of harm experienced that
3 liability may appropriately be imposed on the negligent party.”” *Staats v. Vintner's*
4 *Golf Club, LLC*, 25 Cal. App. 5th 826, 837 (2018) (emphasis in original).

5 Applied here, initially the Botten family was inside their residence when the
6 law enforcement officers encountered Puga contained inside of his vehicle. (UMF 60-
7 68, 70-75) As such, it was not foreseeable that the Botten family was in any type of
8 danger of being shot, and if anything, the danger would have been increased if the
9 Bottens were told to leave their residence. Likewise, once Puga was outside of his
10 vehicle and did not surrender, the Bottens were still inside of their residence
11 (UMF127-130) and again the risk to them would have been increased if they were
12 told do anything other than stay inside the home. Finally, while there may arguably
13 have been a general potential harm to neighbors posted by a potential violent suspect,
14 if not apprehended, that was not the type of harm experienced by the Plaintiffs here,
15 who were injured by stray fire from the CHP Defendants. (UMF 82, 86, 100, 102-
16 103, 104-107, 113).

17 It was simply not foreseeable to the County Defendants that the CHP officers,
18 would abandon their law enforcement training and fail to exercise due care by
19 shooting into the Botten house. (UMF 118). There was plainly no “degree of
20 certainty” that the Bottens would be exposed to gunfire inside of their house by fellow
21 law enforcement officers. Additionally, there was no closeness in connection between
22 the acts taken by the County Defendants, which were focused entirely on
23 apprehending Puga, and the actions of the CHP officers in shooting toward the Botten
24 residence which was the undisputed ultimate cause of the Botten injuries. (UMF 104-
25 113). Finally, as already set forth above, there was no special relationship between
26 the County Defendants and the Bottens.

27 ///

28

3. County Deputies Were Not the Proximate Cause

2 “Like duty, proximate cause reflects a judgment regarding the permissible
3 extent of liability for negligence. It limits the defendant’s liability to those foreseeable
4 consequences that the defendants’ negligence was a substantial factor in producing.”
5 *Mendoza v. City of Los Angeles*, 66 Cal. App. 4th 1333, 1342 (199*). In sum,
6 “[p]roximate cause’ means that the injury or damage was the natural and probable
7 consequence of the wrongful or negligent act or omission and the ability on the part
8 of a person of ordinary intelligence reasonably to have foreseen or anticipated the
9 harmful consequence of his act or omission.” *Osborn v. City of Whittier*, 103
10 Cal.App.2d 609, 615 (1951)(emphasis added). “The question is whether it was
11 reasonably foreseeable that injury or damage would likely occur.” *Osborn*, 103
12 Cal.App.2d at 615-16. “[T]he closeness of the connection between the defendant’s
13 conduct and the injury suffered[,] [citation] is strongly related to the question of
14 foreseeability itself and generally is relevant when intervening third party conduct
15 caused the injury.” *Staats v. Vintner’s Golf Club, LLC*, 25 Cal. App. 5th 826, 839
16 (2018) quoting *Kesner v. Superior Court*, 1 Cal. 5th 1132, 1148 (2016).

17 Plaintiffs claim that Defendants Adams and Vaccari employed negligent tactics
18 when interacting with Puga which eventually led to the shooting. Even if this were
19 true, the undisputed evidence is that they did not shoot the Bottens (UMF 33, 54, 91,
20 93-94, 96-99, 103, 107-112) and could not have reasonably anticipated that one of the
21 CHP officers would have done so. (UMF 118).

22 The law is clear, “a public employee is not liable for an injury caused by the
23 act or omission of another person.” Government Code § 820.8. While nothing in
24 §820.8 “exonerates a public employee from liability for injury proximately caused by
25 his own negligent or wrongful act or omission” the conduct of Sergeant Vaccari,
26 and/or Deputy Adams when trying to apprehend Puga, even if “negligent” was not
27 the proximate cause or otherwise, of any injury to the Bottens. *See*, Government Code

1 §820.8

2 **4. The Actions of the CHP Defendants Were a Superseding
3 Cause**

4 ““A superseding cause is an act of a third person or other force which by its
5 intervention prevents the actor from being liable for harm to another which his
6 *antecedent* negligence is a substantial factor in bringing about.”” *Farr v. NC Mach.*
7 *Co.*, 186 F.3d 1165, 1169 (9th Cir. 1999) quoting Restatement 2d Torts § 440; *Brewer*
8 *v. Teano*, 40 Cal. App. 4th 1024, 1031. “Where, subsequent to the defendant’s
9 negligent act, an independent intervening force actively operates to produce the
10 injury, the chain of causation must be broken.” 6 Witkin, Summary of California
11 Law (11th ed. 2017) Torts § 1348.

12 ““It is usually said that if the risk of injury might have been reasonably foreseen,
13 the defendant is liable, but that if the independent intervening act is highly unusual
14 or extraordinary, not reasonably likely to happen and hence not foreseeable, it is a
15 *superseding cause*, and the defendant is not liable.”” *Ash v. North American Title Co.*,
16 223 Cal.App.4th 1258, 1274 (Cal. 2014) (emphasis added). “A superseding cause
17 generally has to happen after the negligence of the defendant. *Sofec* describes
18 superseding intervening cause as ‘a later cause of independent origin that was not
19 foreseeable.’” *Farr v. NC Mach. Co.*, 186 F.3d 1165, 1168 (9th Cir. 1999)(emphasis
20 added).

21 Once again, even if the Court finds County Defendants were negligent at any
22 time during their apprehension of Puga, the action of the CHP Defendants in shooting
23 toward the Botten residence was not the reasonably foreseeable result of any of the
24 conduct by County Defendants thereby breaking any chain of causation. *See e.g.*,
25 *Lucas v. City of Long Beach*, 60 Cal. App. 3d 341, 351 (Cal. 1976) (“The intentional
26 act of a third person is a superseding cause of harm and relieves the original actor of
27 liability unless such act was reasonably foreseeable or the failure to foresee such act

28

26

1 was a factor in the original negligence."); *Tate v. Canonica*, 180 Cal. App. 2d 898
2 (1960)(“the intervening act of a third person does not relieve the original wrongdoer
3 of liability if the intervening act was a reasonably foreseeable result of the original
4 actor’s wrongdoing.”).

5 **B. NEGLIGENCE INFILCTION OF EMOTIONAL DISTRESS**

6 Plaintiffs have also asserted a claim for Negligent Infliction of Emotional
7 Distress on the grounds that each of the family members witnesses the physical
8 injuries sustained by the others, causing distress. (First Amended Complaint – Dkt.
9 27 ¶¶ 71-72). As an initial matter, Plaintiffs must prove they are (1) closely related
10 to the injury victim, (2) present at the scene of the injury-producing event at the time
11 it occurred and was then aware that it was causing injury to the victim and, (3) as a
12 result suffered emotional distress beyond that which would be anticipated. *Spates v.*
13 *Dameron Hospital Assn.*, 114 Cal.App.4th 208, 213 (2003). To the extent Plaintiffs
14 maintain the actions of the County Defendants were negligent with respect to Puga, it
15 is undisputed there was no relationship between Puga and the Bottens, and therefore
16 the required element of a close relation to the victim is negated. (UMF 68).

17 As to any alleged emotional distress from witnessing the physical injuries of
18 other family members, this is merely an off shoot of their negligence claim as there is
19 no stand alone claim for negligent infliction of emotional distress under California
20 law. *See, Gu v. BMW of N. Am., LLC*, 132 Cal.App.4th 195, 204 (2005) (“[T]he
21 California Supreme Court has emphasized that ‘***there is no independent tort of***
22 ***negligent infliction of emotional distress.***’”) (emphasis added); *Potter v. Firestone*
23 *Tire & Rubber Co.*, 6 Cal. 4th 965, 984 (1993) (“[T]here is no independent tort of
24 negligent infliction of emotional distress.”) (internal citation omitted). As a result,
25 for claims involving emotional distress a plaintiff must still plead and prove
26 negligence by alleging the “traditional elements of duty, breach of duty, causations
27 and damages.” *Burgess v. Superior Court*, 2 Cal. 4th 1064, 1072 (1992).

1 Thus, Plaintiffs' Fifth Claim for Negligent Infliction of Emotional Distress fails
2 for the same reasons as their Negligence theory.

3 **C. GOVERNMENT CODE IMMUNITIES**

4 Even if the Court were to find that there was a legal duty and a triable issue on
5 proximate cause, Plaintiff's claims are still barred by a host of state law immunities.

6 *See, Steinle v. City and County of San Francisco*, 919 F.3d 1154, 1162 (9th Cir. 2019)
7 (finding "courts routinely answer questions of immunity" where facts are not in
8 dispute).

9 Government Code § 820.2 provides "[e]xcept as otherwise provided by statute,
10 a public employee is not liable for an injury resulting from his act or omission where
11 the act or omission was the result of the exercise of the discretion vested in him,
12 whether or not such discretion be abused."

13 The Court defines discretionary acts as "'those wherein there is no hard and
14 fast rule as to the course of conduct that one must or must not take and, if there is a
15 clearly defined rule, such would eliminate discretion.'" *Johnson v. State*, 69 Cal.2d
16 782, 788 (1968). A "'discretionary act is one which requires 'personal deliberation,
17 decision and judgment' while an act is said to be ministerial when it amounts 'only to
18 the performance of a duty in which the officer is left no choice of his own.' *Johnson*,
19 69 Cal.2d at 788 citing *Morgan v. County of Yuba*, 230 Cal.App.2d 938, 942 (1964).
20 Further, it is well settled that "law enforcement personnel have a degree of discretion
21 as to how they chose to address a particular situation." *Hayes v. County of San Diego*,
22 57 Cal. 4th 622, 632 (2013).

23 Plaintiffs from the advantage of hindsight now allege the deputies should have
24 done something to move the Bottens from their residence and/or possibly taken a
25 different approach when apprehending Puga. However, the decisions made by the
26 County Defendants to secure Puga should be deemed discretionary in nature and
27 therefore cloaked with the immunity set forth in Government Code § 820.2. Likewise,

1 if Sergeant Vaccari and/or Adams are immune then so too is the County of San
2 Bernardino. *See*, Government Code § 815.2(b) ("Except as otherwise provided by
3 statute, a public entity is not liable for an injury resulting from an act or omission of
4 an employee of the public entity where the employee is immune from liability.").

5 **D. TORT CLAIM PRESENTATION**

6 Compliance with the tort claim presentation requirements is a condition
7 precedent to suit and the failure to comply bars suit for money damages. Cal. Gov.
8 Code § 945.4; *see e.g.*, *DiCampli-Mintz v. County of Santa Clara*, 55 Cal.4th 983, 991
9 (2012). The requirements are mandatory and strict compliance is required. *Wood v.*
10 *Riverside Gen. Hosp.*, 25, Cal. App. 4th 1113, 1119 (1994). Further, these
11 requirements apply equally where state law claims are brought in federal court. *See*,
12 *Karhim-Panahi v. LA Police Dept.*, 839. F.2d 621, 627 (9th Cir. 1988).

13 Gov. Code § 910 requires: "the facts constituting the causes of action pleaded
14 in the complaint must substantially correspond with the circumstances described in
15 the claims as the basis of the plaintiff's injury." *Connelly v. State of California*, 3
16 Cal.App.3d 744, 743 (1970). Where there has been an attempt to comply but the
17 compliance is defective, the test of substantial compliance controls. Under this test,
18 the court must ask whether sufficient information is disclosed on the face of the filed
19 claim "to reasonably enable the public entity to make an adequate investigation of the
20 merits of the claim and to settle it without the expense of a lawsuit." *City of San Jose*
21 *v. Superior Court*, 12 Cal.3d 447, 456 (1974). The doctrine of substantial compliance,
22 however, cannot cure total omission of an essential element from the claim or remedy
23 a plaintiff's failure to comply meaningfully with the statute. *Hall v. City of Los*
24 *Angeles*, 19 Cal.2d 198 (1941); *Loehr v. Ventura County Community College Dist.*,
25 147 Cal.App.3d 1071, 1082-83 (Cal. 2d 1983).

26 Here the identical claims submitted by each Plaintiff generally allege "[t]here
27 were shots fired by the police agency employees. Respondent with family members

1 were at their home located at 17994 Catalpa Street, Hesperia, CA 92395. The bullets
2 shot and fired in the course of the pursuit and apprehension struck claimant resulting
3 in serious injuries and damage.” (UMF 123-126). In short, Plaintiffs’ Tort Claim
4 contends they are seeking damages for bullets that struck them. The County
5 Defendants had the ability to investigate this claim and have presented clear and
6 irrefutable evidence that the bullets fired by County Defendants did not strike any
7 Plaintiff. What Plaintiffs failed to do is provide notice of or give the County the ability
8 to investigate their revised theory that the County Defendants caused the Bottens’
9 injuries through various pre-shooting tactics. *See e.g., Fall River v. Joint Unified*
10 *School District v. Superior Court*, 206 Cal. App. 3d 431, 435 (1988) (dismissing
11 Plaintiff’s complaint where new cause of action was “an entirely different factual
12 basis than what was set forth in the tort claim”); *Donohue v. State of California*, 178
13 Cal. App. 3d 795, 804 (1986) (tort claim alleging DMV negligently allowed uninsured
14 motorists to take driving exam did not fairly encompass cause of action alleging
15 negligent supervision by the driving instructor during exam). As such, this theory of
16 liability must be dismissed.

17 | V. CONCLUSION

18 For all the reasons stated herein, summary judgment should be granted.

20 | DATED: January 30, 2025

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CERTIFICATE OF COMPLIANCE

2 The undersigned, counsel of record for County Defendants certifies that this
3 brief contains 6,827 words, which:

4 complies with the word limit of L.R. 11-6.1.
5 complies with the word limit set by court order dated _____.

6 DATED: January 30, 2025

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